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(1)
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

320 n S # 37
No. 129 MOR-NIK

MORRIS INVESTMENT CORPORATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT, AND BRIEF IN SUP-
PORT THEREOF.**

EDWARD L. BLACKMAN,
Counsel for Petitioner.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 129

MORRIS INVESTMENT CORPORATION,
Petitioner,
against

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI.

*To the Honorable the Chief Justice of the United States and
the Associate Justices of the Supreme Court of the
United States:*

The petition of Morris Investment Corporation herein
respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

This proceeding was a petition by the taxpayer, Morris Investment Corporation, addressed to the United States Circuit Court of Appeals for the Third Circuit, for a review of the decision of the United States Board of Tax Appeals (now the United States Tax Court) ordering and

deciding that there were deficiencies in Income Tax and Personal Holding Company Surtax of the petitioner for the year 1937 in the respective amount of \$15,738.74 and \$56,205.96.

The matter was presented to the Board of Tax Appeals and although the parties were unable to agree upon a stipulation of facts prior to the trial, the trial developed no issue of fact.

Two principal questions were involved:

1. The petitioner claimed that it was not liable for any Undistributed Profits Tax or any Personal Holding Company Surtax for the year 1937 for the reason that while it had statutory income for the year 1937 it had no income which it could lawfully distribute to its stockholders and was unable to declare any dividend which would be taxed to its stockholders; and

2. For the further reason that neither of said so-called taxes was really a tax at all, but each constituted a penalty applied for the coercion and destruction of certain corporations.

The petitioner made other and further claims to the effect that the said taxes applied to the petitioner in the case at bar are unconstitutional and void.

Petitioner based all of the above claims on the fact that it was a so-called "deficit corporation" and could make neither a lawful distribution to its stockholders during the taxable year nor any distribution lawful or unlawful which would be taxable to its stockholders, and for which it could obtain a dividends paid credit under the 1936 and 1937 Acts.

The United States Board of Tax Appeals, as above stated, found on all points for the respondent and ordered and decided that the said deficiencies existed.

The petitioner petitioned the United States Circuit Court

of Appeals, Third Circuit, for a review of the decision of the United States Board of Tax Appeals.

After the briefs had been filed by the attorneys for the respective parties, but prior to the argument of the case before the Circuit Court of Appeals, Third Circuit, which took place on the third day of November, 1942, the Revenue Act of 1942 became effective (October 21, 1942).

The new Revenue Act amended the Internal Revenue Code in a number of respects, including an amendment of the Undistributed Profits Tax provision which had already been repealed. (Section 501, Revenue Act of 1942 (56 Stat. C. 619), amending Section 14 (a) (2), Section 26 (c) and Section 26 of the Revenue Act of 1936 (49 Stat. C. 690)).

Upon the oral argument before the United States Circuit Court of Appeals, the government conceded that the Amendment to the Undistributed Profits Surtax might have a bearing on petitioner's liability for that tax, and both parties thereupon agreed that the cause be remanded to the Board for consideration of the effect of that section upon petitioner's liability for the Undistributed Profits Surtax (R. 36) (134 F (2) 774). That point is therefore not involved in this petition.

Petitioner, however, contended that the Revenue Act of 1942 completely sustained petitioner's contention that not only the Undistributed Profits Tax but the Personal Holding Company Surtax were unconstitutional and void in so far as applied to "deficit corporations", which could not avoid the imposition of the heavy taxes provided in those sections by distributions to their stockholders because such distributions would not be taxable to the stockholders and therefore would not be considered as deductions from undistributed income (R. 36), (134 F. (2) 774).

The United States Circuit Court of Appeals for the Third Circuit overruled petitioner's contention and confirmed the

decision of the Board of Tax Appeals in so far as it determined the petitioner's liability for the Personal Holding Company Surtax (R. 38).

However, it remanded the cause with respect to the Undistributed Profits Surtax to the Tax Court of the United States, with directions to reconsider petitioner's liability thereunder in the light of Section 501 of the Revenue Act of 1942 (R. 38).

Therefore the sole question presented by the petitioner herein, is as to petitioner's liability for Personal Holding Company Surtax under the Revenue Act of 1936 (49 Stat., p. 1648), as amended, including the amendments of that Act by the Revenue Act of 1942.

The decision of the United States Board of Tax Appeals was entered in the Office of the Clerk of the said Board on the 5th day of January, 1942, and the opinion and decision of the Circuit Court of Appeals, Third Circuit, affirming that decision, was handed down and filed on the 31st day of March, 1943 (R. 35).

The Order for Mandate of the United States Circuit Court of Appeals, Third Circuit, was issued on the 20th day of April, 1943 (R. 38).

B.

Specification of Errors.

The Circuit Court of Appeals for the Third Circuit erred:

1. In affirming the order of the Board of Tax Appeals in so far as it determined the petitioner's liability for the Personal Holding Company Surtax, and in determining that there was a deficiency in Personal Holding Company Surtax of the petitioner to \$56,205.96 for the year 1937.

2. In failing to reverse the order of the Board of Tax Appeals and direct the respondents to redetermine the said

deficiency in Personal Holding Company Surtax for the year 1937 and find that no deficiency existed.

3. In failing to find and hold that petitioner was, during the year 1937, a "deficit corporation" within the meaning of Section 501 of the Revenue Act of 1942, (56 Stat. C, 619) amending Section 26 (c) of the Revenue Act of 1936 (49 Stat. C, 690).

4. In failing to find and hold that petitioner had a deficit in accumulated earnings and profits as of the close of the year 1936 and a greater deficit at the close of the year 1937, and that petitioner was prohibited by a provision of law of the State of Delaware, under the laws of which State petitioner was incorporated, from paying dividends during the year 1937, and that such provision of law of the State of Delaware was in effect during the entire year 1937 and prior to the first of May, 1936.

5. In failing to find and hold that the provisions of Section 501 (a) (3) of the Revenue Act of 1942 (56 Stat. C, 619) amending Section 26 of the Revenue Act of 1936 (49 Stat. C, 690), relating to the credits of corporations, by adding a new sub-paragraph (f), entitled "deficit credit", applied to every case provided for in the Internal Revenue Code where "adjusted net income" and "undistributed adjusted net income" were referred to, and that such provision is not restricted to the case of the Undistributed Profits Tax only.

6. In failing to find and hold that under Sections 26 (c) and 26 (f) of the Revenue Act of 1936 (49 Stat. C, 690), as amended by the Revenue Act of 1942 (56 Stat. C, 619), the petitioner, being a "deficit corporation", in computing its Personal Holding Company Surtax, was entitled to a deficit credit equal to the amount by which its adjusted net income exceeded its earnings and profits accumulated after

February 28, 1913, and up to the beginning of the taxable year 1937, and the earnings and profits of the taxable year 1937, and in failing to find that such credit would wipe out completely petitioner's adjusted net income for the year 1937.

7. In failing to hold and find that the Section 351 of the Revenue Act of 1936 (49 Stat. C, 690), as amended by Sections 353 to 360 of the Revenue Act of 1937 (which sections provide for the taxation of Personal Holding Corporations) were unconstitutional and void as applied to this petitioner, a deficit corporation (U. S. Const., Amdts 5 and 14).

C.

Reasons Relied Upon for the Allowance of the Writ.

The questions relied upon are Federal questions arising under the Revenue Acts of 1936, 1937 and 1942 and are as follows:

(a) whether the Personal Holding Company Surtax, Title I-A of the Revenue Act of 1936, as amended by the Revenue Act of 1937 (Chapter 815, 50 Stat., 813), was retroactively amended by the Revenue Act of 1942, Section 501 (a) (56 Stat. C, 619), in such manner that petitioner is entitled to the "deficit credit" provided by said Act which credit would reduce to nothing its undistributed adjusted net income for 1937.

(b) whether the said Personal Holding Company Surtax, as imposed by the Revenue Act of 1936 (49 Stat. C, 690), as amended by the Revenue Act of 1937 (50 Stat. C, 815), was not unconstitutional and void because it amounted to an attempt in the guise of a tax to destroy so-called Personal Holding Companies, and furthermore, because, piled on top of other taxes

against so-called Personal Holding Companies, it amounted to arbitrary confiscation and not lawful taxation.

It is submitted that the question of the effect of the Revenue Act of 1942 on the taxable income of Personal Holding Companies for the taxable year 1937, and subsequent taxable years up to and including 1941, is obviously a question which will arise in the case of a large number of Personal Holding Companies, and that its proper determination is a matter affecting many persons and large amounts of income, and is a matter of grave public interest and importance.

This question has not previously been decided by this Court nor, the petitioner believes, by any Court other than in this case by the United States Circuit Court of Appeals for the Third Circuit, a review of whose decision this petition seeks.

Since Section 186 (h) and 501 (c) of the Revenue Act of 1942 (56 Stat. C, 619) provide for refunds or credits to the extent of any overpayments of Undistributed Profits Tax and of Personal Holding Company Surtax for any taxable years resulting from the retroactive application of those two sections of the Revenue Act of 1942, it is obvious that the interpretations placed upon these sections is extremely important and is a matter of vital interest in terms of dollars and cents to a great many corporations and persons. Those sections constitute an attempt by Congress to remedy a situation which resulted from prior revenue acts and which was obviously a grave injustice, to wit, the penalizing of the stockholders of corporations because of the fact that the said corporations could not legally distribute what constituted statutory but not real income and penalized those corporations whose dividends were not taxable to its stockholders.

We therefore respectfully submit that the questions herein involved are matters of great public importance and should be settled by this Court at the earliest possible moment in order to avoid and render unnecessary a multiplicity of suits for refunds of overpayments of taxes paid by Personal Holding Companies during the years affected by the amendment (1937-1941).

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued to review the judgment of the Circuit Court of Appeals for the Third Circuit, ordering and deciding that there was a deficiency in Personal Holding Company Surtax of said petitioner for the year 1937 in the amount of \$56,205.96; that said judgment be reversed and that your petitioner may have such other and further relief in the premises as may be just and proper.

Dated: New York, New York, June 28, 1943.

MORRIS INVESTMENT CORPORATION,
Petitioner,

By EDWARD L. BLACKMAN,
Counsel for Petitioner,
120 Broadway,
New York, New York.

STATE OF NEW YORK,
County of New York, ss:

EDWARD L. BLACKMAN, being duly sworn, says:

That he is the counsel for Morris Investment Corporation, the petitioner, that he prepared the foregoing petition, and that the allegations thereof are true as he thoroughly believes.

EDWARD L. BLACKMAN.

Sworn to and subscribed before me this 28th day of June, 1943.

FLORENCE E. AVERY,
Notary Public, Nassau County.

